1996

B.N. Glanville, Joseph D. Sanders and Cheryl M. Sanders v. The City and Municipality of Draper, The Draper City Board of Adjustment, The Draper City Planning Committee, The Draper City Council, Charles L. Hoffman, Robert Brown, Diane Brown, Kim Stevens : Brief of Appellee

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE UTAH COURT OF APPEALS

B. N. GLANVILLE, JOSEPH D. SANDERS and CHERYL M. SANDERS, Plaintiffs/Appellants, vs. THE CITY AND MUNICIPALITY OF DRAPER, THE DRAPER CITY BOARD OF ADJUSTMENT, THE DRAPER CITY PLANNING COMMITTEE, THE DRAPER CITY COUNCIL, CHARLES L. HOFFMAN, Mayor of Draper, ROBERT BROWN, DIANE BROWN, and KIM STEVENS, Defendants/Appellees.	**BRIEF OF APPELLEES BROWN** Appeal No. 960833-CA

APPEAL FROM A DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
JUDGES LEONARD H. RUSSON AND ANNE M. STIRBA

Oral Argument Priority Classification No. 15

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STATEMENT OF JURISDICTION

The Utah Supreme Court has appellate jurisdiction over this case under Utah Code Ann. §78-2-2(3)(j). The Supreme Court is authorized to transfer this appeal to the Court of Appeals under Utah Code Ann. §78-2-2(4). The Court of Appeals has appellate jurisdiction over this case pursuant to Utah Code Ann. §78-2a-3(2)(k).

STATEMENT OF ISSUES

Defendants and appellees Brown disagree with the statement of issues relating to Browns that is contained in the Brief of Appellants.[1]

1. Whether Sanders, who owns no real estate in Draper City or in the vicinity of the subject property, has standing to assert any claim in this action. The district court found at trial that Sanders owned no interest and was estopped to assert any interest in the property adjacent to the Brown Parcel [R. 901, 908] and Sanders does not appeal from that determination. The issue whether one not having any interest in real property in the vicinity of the Brown Parcel can assert a private nuisance claim, assert a trespass claim, or challenge a subdivision of the Brown Parcel is a question of law and is therefore reviewable for correctness. Carlie v. Morgan, 922 P.2d 1 (Utah 1996).

2. Whether the district court's Partial Summary Judgment dismissing Fifth [negligence], Sixth [illegal subdivision], and Seventh [private nuisance] Causes of Action of plaintiffs' Amended Complaint against Browns can be sustained on any of the following grounds:

(a) Sanders' counsel during oral argument agreed that the negligence claim, Fifth Cause of Action, should be dismissed. [R. 962.]

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[1] The issues relating to Browns are contained in paragraphs 3 and 4 of Appellants' Brief at pages 1-2.

(b) The statute of limitations bars plaintiffs' challenge to Draper City's variance. This issue presents a question of law and is therefore reviewable for correctness. Carlie v. Morgan, 922 P.2d 1 (Utah 1996). This issue was one of the grounds for the district court's Partial Summary Judgment in favor of Browns. [R. 310-11, 971-72.]

(c) Plaintiffs cannot, as a matter of law, maintain a private action challenging the sale of a subdivision lot under zoning and planning laws. This issue presents a question of law and is therefore reviewable for correctness. Id. This issue was one of the grounds for the district court's Partial Summary Judgment in favor of Browns. [R. 310-11, 972-73.]

(d) Glanville, as owner of the only affected property, did not complain concerning any violations of the subdivision laws. The court found that Glanville had no complaint with Browns and Glanville admitted that Browns never did anything about which he was complaining. [R. 902, 905, 908.] The district court so found at trial, and Sanders does not challenge that finding on appeal. Whether a claim can be stated by one who has no complaint concerning the conduct at issue is a question of law reviewable for correctness. Id.

(e) Plaintiffs suffered no injury flowing from the conduct of Browns with respect to the subdivision of the subject property. This issue presents a question of law and is therefore reviewable for correctness. Id. This ground was a basis for the district court's Partial Summary Judgment in favor of Browns. [R. 199-201, 310-11.]

3. Whether the district court erred in holding that plaintiff Sanders is liable to Browns in the amount of the attorney's fees incurred by Browns in preparing for and attending trial and in any post-trial proceedings in this action under Utah Code Ann. §78-27-56.

The issue whether plaintiffs' claims were "without merit" is a question of law reviewed for correctness; the issue whether Sanders pursued his claims in "bad faith" is a question of fact reviewed under the clearly erroneous standard. Jeschke v. Willis, 811 P.2d 202 (Utah App. 1991). This issue was preserved for appeal in the evidence and argument presented at trial. [R. 277-292.]

DETERMINATIVE PROVISIONS

Utah Code Ann. §10-9-15 (1953):

> The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after filing of such decision in the office of the board.

Utah Code Ann. §78-38-1 (1953):

> Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by [the] nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.

Utah Code Ann. §78-27-56:

> (1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).
>
> (2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:
>
> (a) finds the party has filed an affidavit of impecuniosity in the action before the court; or
>
> (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

STATEMENT OF THE CASE

Nature of the Case

Plaintiff Sanders owned three contiguous parcels of land in Draper City, Utah. Sanders did not pay his mortgage payments, and his lender, Mountainwest Savings and Loan, foreclosed a deed of trust covering only one of those three parcels. Browns ultimately purchased that parcel from Mountainwest. To insulate his remaining property from his creditors, Sanders conveyed his other two parcels to his brother-in-law, Glanville. Instead of challenging Mountainwest's foreclosure, Sanders and Glanville sued Draper City, Browns, and another of Sanders' neighbors, Stevenses (but not the foreclosing lender), alleging violations of the subdivision laws, negligence, illegality, private nuisance, and trespass. Draper City, Browns, and Stevenses had nothing to do with the foreclosure that caused Sanders his damage -- it was self-inflicted.

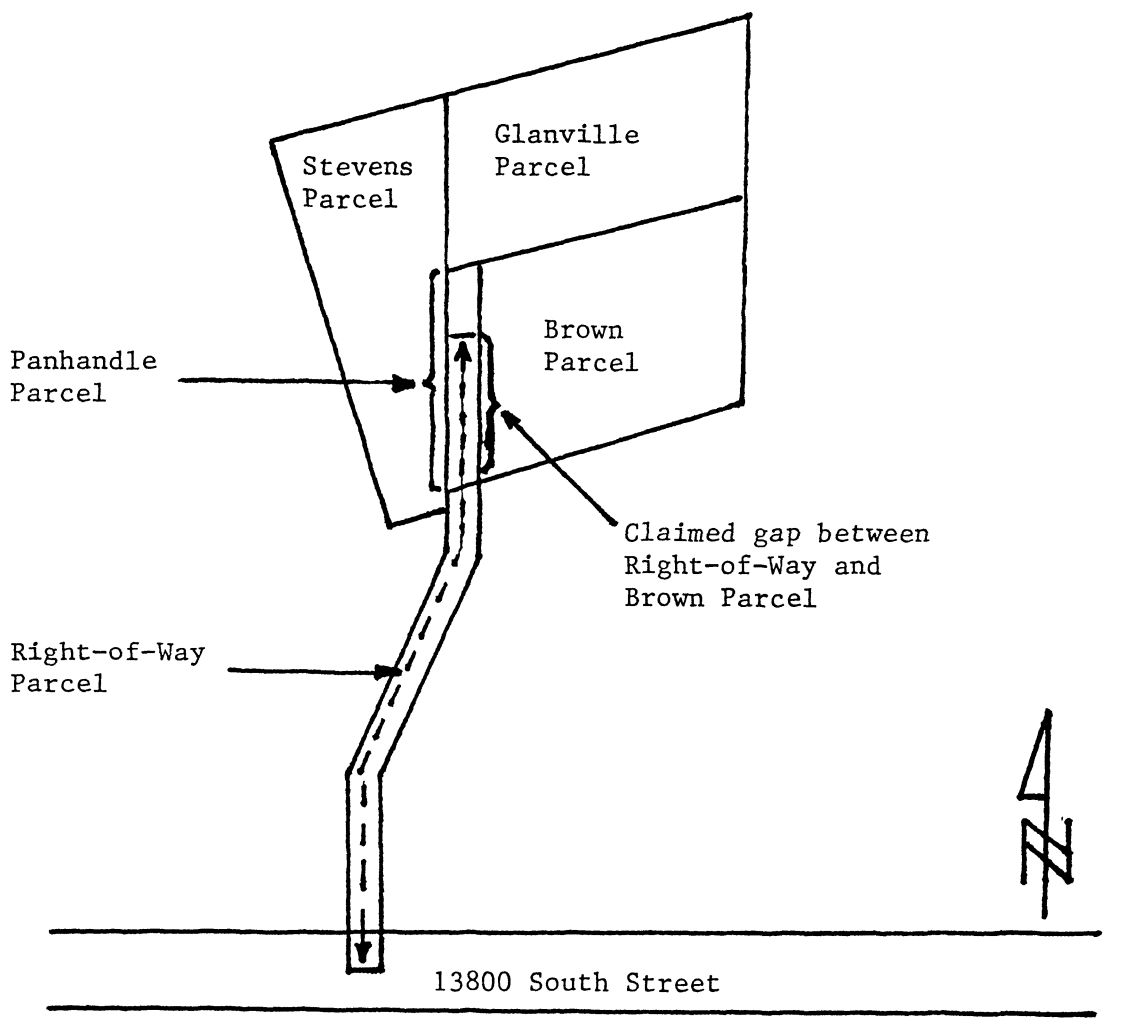
Disposition Below

Early on, the court granted Draper City's motion to dismiss all claims against Draper City and its representatives. [R. 97-99.] The court thereafter granted two successive motions for summary judgment by Browns, which terminated all claims of plaintiffs against Browns other than a part of Sanders' trespass claims. [R. 310-12, 606-14.] Following a bench trial, the court dismissed with prejudice plaintiffs' remaining trespass claims against Browns and determined that this action was without merit, was not brought or asserted in good faith, and that Sanders was liable to Browns for their attorney's fees at trial and in any post-trial proceedings under Utah Code Ann. §78-27-56. [R. 894-911.] This appeal followed.

Statement of Facts

The statement of facts contained in the Brief of Appellants generally contains Sanders' version of things, which was rejected by the trial court, and ignores the mountain of evidence in opposition to the position of Sanders. Browns therefore advance their own statement of facts.

This action concerns several parcels of property and a right-of-way serving them. Following is a graphic depiction of the land in question [R. 369]:



For convenience, each parcel identified above will hereinafter be referred to by the names noted above.

Sanders' Acquisition of the Property. Between 1979 and 1981, Ovards acquired all of the Brown Parcel, the Glanville Parcel, and the Panhandle Parcel, together with a right-of-way over the Right-of-Way Parcel. [Ex. 8 ¶¶16-18.] Ovards transferred to Nipkos fee title to the Brown Parcel and a right-of-way over the Right-of-Way Parcel in December 1980. [Ex. 8 ¶¶19, 20.] Nipkos concurrently gave Mountainwest Savings and Loan a trust deed covering only the Brown Parcel and a right-of-way over the Right-of-Way Parcel. [Ex. 8 ¶¶19, 20.] Nipkos later conveyed the Brown Parcel and a right-of-way over the Right-of-Way Parcel to Sanders by Uniform Real Estate Contract dated July 28, 1982. [Ex. 8 ¶21.] Sanders assumed the Mountainwest trust deed at the time of his purchase. [R. 1082.] At a later date, in November 1982, Sanders acquired from Ovards the Glanville Parcel and the Panhandle Parcel. [Ex. 8 ¶24.] Thus, for some period of time, Sanders owned the Brown Parcel and right-of-way but did not own the adjacent Panhandle Parcel and Glanville Parcel.

The Mountainwest Foreclosure, the Variance, and Browns' Purchase. In 1987, Sanders moved away from his house on the Brown Parcel and ceased making payments to Mountainwest. [R. 1034, 1082.] Sanders ceased making the mortgage payments because he "went someplace else and . . . couldn't afford to make double payments." [R. 1085.] Mountainwest therefore initiated a nonjudicial foreclosure. After the foreclosure was initiated, but before it was completed, Mountainwest sought and obtained from Draper City a variance allowing the Brown Parcel to be separately occupied. [Ex. 4.] Sanders personally appeared at the variance hearing and opposed the granting of the variance. [R. 1238.] Sanders made no effort to appeal that variance, which validated the subdivision of the Brown Parcel. Mountainwest completed its foreclosure and received a trustee's deed covering the Brown Parcel and a right-of-way over the Right-of-Way Parcel, which was recorded on September 1, 1988. [Ex. 8 ¶22.] Months after the foreclosure sale, Mountainwest in

January 1989 sold and conveyed the Brown Parcel and a right-of-way over the Right-of-Way Parcel to Browns. [Ex. 8 ¶23.]

Sanders' Phony Conveyance to Glanville. Sanders was concurrently being sued by Ovard (his seller on the Glanville and Panhandle Parcels) and being foreclosed upon by his lender on the Brown Parcel, Mountainwest. In that context, Sanders transferred the Glanville Parcel and the Panhandle Parcel to his sister and brother-in-law, M.D. and B.N. Glanville, by "Grant Deeds" dated May 19, 1988. Sanders made those transfers shortly before and with actual knowledge of the imminent entry of judgment against Sanders and in favor of Ovard for the balance of Sanders' purchase money and one week before the initially scheduled date for foreclosure of the Mountainwest trust deed on the Brown Parcel.[2] [R. 1085-89.] Glanville gave no real consideration for the transfer. Glanville claimed Sanders gave him a ten dollar bill, but Sanders denied paying even that nominal amount. [R. 1355, 1471.] Sanders admitted that he conveyed the Glanville Parcel and Panhandle Parcel to his relatives "to protect that property from foreclosure risks." [R. 1089-90.] The court found that Sanders transferred those properties to Glanville to place them beyond the reach of his creditors. [R. 901.]

The district court found that Sanders thereafter owned no interest in the Glanville Parcel or the Panhandle Parcel and that, by conveying those parcels to Glanville to place them beyond the reach of his creditors, Sanders was estopped to assert that he had any ownership of that property in this action. [R. 901, 908.] Sanders' position on the ownership of the Glanville Parcel and the Panhandle Parcel (which would have granted standing to sue Browns for trespass) was irreconcilably inconsistent: First, in answers to interrogatories

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[2] The Mountainwest foreclosure was rescheduled and actually occurred months later in September 1988. [Ex. 8, Tab K.]

prepared after consulting with his counsel, Sanders stated under oath that Glanville owned fee simple title to the Glanville Parcel and, although asked, Sanders did not identify himself as a holder of any encumbrance, lien or other interest in the Glanville Parcel. [R. 1091-92.] Glanville testified in his deposition that Sanders transferred the property to him to "protect his [Sanders'] interest." Glanville assumed that Sanders' creditors were nosing around for assets, and probably Sanders was protecting the property from his creditors. [R. 1356-57.] Glanville also testified that Sanders sold the property to him and that "right now he [Sanders] doesn't own any interest in the property. His [Sanders'] interest is whatever I say it is." Glanville testified that when the property is sold, Sanders would only receive "what I [Glanville] say he'll get." [R. 1352, 1356-58.] Second, inconsistently with his claimed ownership of those parcels, Sanders attempted to acquire the rights of Glanville through an "Assignment" that was first made known to Browns by serving a copy of it upon their counsel by mail on July 10, 1995 -- just three days before trial in this six year old case commenced. [Ex. 1; R. 895-97.] The court on multiple grounds rejected the admissibility of the Assignment. Third, at trial, and wholly inconsistently with his prior testimony and actions, Sanders asserted that he owned an equitable interest in the property. [R. 1037.]

The Right-of-Way Location. Sanders claimed that Browns trespassed on the Panhandle Parcel because there was a few foot gap between the Right-of-Way Parcel and the Brown Parcel. The right-of-way over the Right-of-Way Parcel was and is the only access to the Brown Parcel. [Ex. 8 ¶27.] The Right-of-Way Parcel was described in numerous transfers of the Brown Parcel. [Ex. 8 ¶¶11-25.] Although the metes and bounds description of the Right-of-Way Parcel literally described a parcel with a small gap between it and the Brown Parcel (to which it was intended to furnish access), many of those transfers also described that metes and bounds description of the Right-of-Way Parcel as "connecting [the

Brown Parcel] to 13800 South Street" and "adjacent to and parallel with the west line of the [Brown Parcel]. . . ." [Ex. 8, Tabs G-L, N.] Contrary to their claims in this action, both Sanders and Glanville testified in their depositions that they understood that the Right-of-Way Parcel was adjacent to and connected to the Brown Parcel. [R. 1374-77, 1441-43.] The trial court ruled on summary judgment, based independently on the three grounds of deed construction, easement by necessity, and reformation, that the Right-of-Way Parcel was in fact adjacent to and connected with the Brown Parcel. [R. 606-13.]

The Death of Glanville. The court by notice served March 15, 1995 scheduled the trial of this action to commence on July 13, 1995. [R. 764.] B.N. Glanville died in May 1995. [R. 895.] Sanders' counsel served a Suggestion of Death concerning B.N. Glanville in this action on June 13, 1995. About a month later, Sanders on July 10, 1995 (three days before trial) by mail served a "Designation of Additional Exhibit" -- an "Assignment of Claim" purporting to assign Glanville's claims back to Sanders. [R. 768.] The court ruled the Assignment inadmissible for a host of reasons. [R. 895-97.] Sanders never filed a motion for substitution of the personal representative of B.N. Glanville or other proper party as required by Rule 25, Utah Rules of Civil Procedure. [R. 895-96.]

Sanders' Frivolous Claims in this Action. Sanders' dealings with Browns followed Sanders' being foreclosed out of the Brown Parcel and Sanders' fraudulent conveyance of his adjoining land to his relatives. With no prior communication to Browns whatsoever, Sanders caused his then-attorney, Frederick Green, to direct correspondence to Browns in March 1990, demanding that Browns cease trespassing over the gap between the right-of-way and the Brown Parcel and that Browns remove their horses from the Glanville Parcel. [Ex. 3; R. 1096-97.] Within one or two days, Browns removed their horses from the Glanville Parcel.

[R. 1097, 1173.] Sanders nevertheless filed this action against Browns on April 23, 1990. [R. 01.]

Sanders asserted two groups of claims against Browns: First, Sanders alleged that Browns negligently acquired the Brown Parcel and that their ownership and occupation of that property (in which Sanders concededly had no interest) allegedly violated subdivision laws and therefore constituted a "private nuisance" and illegal ownership. [R. 157-58.] Sanders advanced these arguments in support of his obviously frivolous claims: He claimed that Browns' purchase of the property from Mountainwest (Sanders' foreclosing lender) violated his rights. He asserted that Mountainwest's sale of the property to Browns (a transaction to which he was not a party) was illegal and should be rescinded. He asserted that the Browns' occupation of the same property that he, himself, had previously occupied constituted a "private nuisance." [R. 157-58.] Those frivolous claims were resolved by Browns' first motion for summary judgment. That left only Sanders' trespass claims for resolution.

Sanders asserted two kinds of trespass claims. Sanders' first trespass claim was that, in passing from the house and garage on the Brown Parcel to the literal metes and bounds description of the Right-of-Way Parcel, Browns were passing over and trespassing upon the Glanville Parcel because there was a small gap between the Right-of-Way Parcel and the Brown Parcel. [R. 155.] Sanders' position was both ridiculous and inconsistent with his own conduct. In addition to the undisputed facts that the Right-of-Way Parcel was described as connecting the Brown Parcel to 13800 South Street and was adjacent to the Brown Parcel, both Sanders and Glanville testified in their depositions that they understood that the Right-of-Way Parcel was adjacent to and connected to the Brown Parcel. [R 1374-77, 1441-43.] When Sanders owned the Brown Parcel (and before he acquired the Panhandle Parcel), he

used the right-of-way as his only access to the Brown Parcel. [R. 1080-81, 1438-43.] When Sanders read the description of the right-of-way in his real estate contract, he "understood that the right-of-way was next to and touched [the Brown Parcel]." [R. 1442-43.] When Sanders conveyed the Glanville Parcel and the Panhandle Parcel to Glanville, he provided in each of those two deeds that the conveyance was together with and subject to the very same metes and bounds description of the right-of-way. [Ex. 8 ¶25.] Thus, Sanders' position in this litigation was directly and irreconcilably contrary to the positions that he took when he, himself, owned the Brown Parcel. Browns filed a second motion for summary judgment aimed at this issue, and the district court's summary judgment ruled that, based upon the undisputed facts, the Right-of-Way Parcel was intended to, and does in fact, touch the Brown Parcel. [R. 606-14.] Sanders does not challenge that ruling on appeal.

Sanders' next group of trespass claims asserted that Browns were improperly using the Panhandle Parcel (over which they had a right-of-way) and were through their horses trespassing on the Glanville Parcel. Sanders contended that the existence of a driveway adjacent to the Browns' garage, which extended into their right-of-way over the Glanville Parcel to the extent of approximately 4½ feet, constituted a trespass. The driveway of which Sanders complained was installed before Sanders acquired the Brown Parcel, and Sanders, himself, used the driveway in the same manner that he claims is wrongful as to Browns. [R. 1105-06.] The Panhandle Parcel, because of its narrow width and the right-of-way in favor of Browns and Stevenses over it, cannot be used by Sanders for any purpose other than access. [R. 1104-05.] Sanders admitted that the existence of the driveway did not in any way interfere with his use of the Panhandle Parcel. [R. 1106.] Obviously, as the court found, a driveway is a use permitted by an access right-of-way.

Sanders next complained that Browns' yard grass encroached slightly upon the Glanville Parcel. Browns had a right-of-way in this area as well. Browns renewed an area of lawn within existing landscaping contours that had existed when they purchased the property. [R. 1177-78.] Sanders admitted that Browns merely replaced with lawn the weeds that had previously grown into the area. [R. 1116-17.] The existence of the encroaching lawn, just as the weeds that existed there previously, did not interfere with Sanders' use of the Panhandle Parcel. [R. 1115-16, 1182-83.] Because Sanders complained about the grass, Browns removed it. [R. 1116, 1180-81.]

Sanders also complained that Browns' horses trespassed on the Glanville Parcel. During Sanders' ownership of the Brown Parcel, Sanders gave Layne Newman permission to run horses on the Glanville Parcel. [R. 1094.] At that time, Newman installed a fence that surrounded both the Glanville Parcel and the northerly portion of the Brown Parcel. [R. 1095.] Sanders gave Newman permission to run his horses there because Sanders wanted the horses to control plant growth. Sanders did not limit his permission to horses owned by Newman. [R. 1094-95, 1139-41.] When Browns bought the Brown Parcel, the fence was still in place and Newman's horses were still there. [R. 1095, 1141-42, 1170-71.] Sanders never revoked permission to run horses within that fence until Sanders' attorney sent a letter to Browns dated March 2, 1990. [R. 1096.] Within two days after receiving that letter, Browns removed their horses and fenced them out of the Glanville Parcel. [R. 1173.] Newman's horses occupied the Glanville Parcel for about a year; Browns' horses occupied the Glanville Parcel between the fall of 1989 and March 5 or 6, 1990 -- about six months. [R. 1141, 1170-73.] Sanders cannot say that Browns' horses did any damage to the Glanville Parcel. [R. 1098-99.] At trial, he conceded that he claimed no such damage. [R. 1100.] During his deposition in this case, Browns' counsel told Sanders:

> Well, let me tell you right now on this record that the Browns want to compensate you for any time their horses were on that property fairly. And I want you to tell me what it is so I can get you paid. [R. 1416.]

Browns' counsel specifically asked Sanders to determine a fair rental per month for this purpose. Sanders promised to get that information to Browns. [R. 1416-17.] At trial, Sanders admitted that he never advised Browns of a fair rent. [R. 1101.] Instead, he went to trial and testified that a fair rent was $50 per month [R. 1063] (for a total of about $250). Thereafter, but eight months before trial, Browns filed an Offer of Judgment in the amount of $750. Sanders never responded. [R. 640.]

Sanders' Motivation. Sanders' statements and conduct are internally and mutually irreconcilable. Sanders admits that Mountainwest had conducted its foreclosure sale and Sanders had conveyed the Glanville Parcel and the Panhandle Parcel to Glanville before Browns ever appeared on the scene. [R. 1093.] Thus, Sanders had already lost the Brown Parcel to foreclosure, Draper City had already granted the variance of which Sanders complains, and Sanders had already fraudulently conveyed his remaining properties to Glanville before Browns appeared. Sanders had nothing to do with Browns' purchase of the Brown Parcel from Mountainwest. [R. 1126-27.] Apart from meeting them at his deposition, Sanders had never met or spoken with Bob and Diane Brown. [R. 1127.] According to Sanders, Browns are "nice people" and he has no ill-will towards them. [R. 1240.] Amazingly, Sanders admitted that he had not been wronged by the Browns and stated as follows:

> The Browns just stumbled into the middle of the case. But the Browns have not done anything except they got a piece of property that had problems associated with it. And I am attacking the property, not the Browns. [R. 1251.]

Nevertheless, Sanders' Complaints allege that "the actions of Brown . . . have been intentional [and] malicious." [R. 13.]

Sanders testified that the principal purpose for initiating this action against Browns was to rectify the incorrect subdivision of the Brown Parcel from the remaining parcels and to correct an alleged unlawful subdivision problem, so that he could sell legal lots. [R. 1239, 1244-45.] However, nothing in Sanders' Complaint seeks that relief [R. 160], and Sanders has never asked Browns to take any action to correct that problem, such as executing or recording a document concerning these subjects. [R. 1244-45.] Sanders admits that he never asked Browns or Stevenses to do anything to help with the subdivision problem. [R. 1248.] Sanders' Complaints against Browns ask only for money, even including punitive damages. [R. 160, 1245-48.] Sanders never attempted to sell his property or acquire governmental approval of the right to build or develop his property; indeed, Draper City has advised Sanders that it will issue a building permit with respect to the Glanville Parcel. [R. 1122-25.] Although Stevenses wanted to buy Sanders' property, Sanders declined. [R. 1234.]

The real reason that Sanders initiated this action, as the district court found, was to extract from Browns money to which he was not entitled. Sanders is attempting to cover his self-inflicted losses from the Mountainwest foreclosure through a bogus action against innocent people who did nothing wrong. At trial, Sanders admitted that he filed and pursued the lawsuit against Browns, at least in part, "to subject them to intense pressure so that they would pay [Sanders] settlement money." [R. 1127-28.] Sanders' Brief concedes this testimony, but claims that it was the result of counsel "badgering" Sanders. However, in Sanders' deposition, he advanced the same testimony without any prodding:

Q Okay. You are indicating that you believe that Mountainwest would have done what you wanted it to do, but the Browns won't; is that what you are saying?

A I guess I believe that unless intense pressure is put on the Browns that they are not going to make a settlement that I believe would be equitable. That's my belief. [R. 1431.]

After Sanders filed his action, but before any motions for summary judgment were filed, Browns' counsel contacted Sanders' counsel and earnestly urged that the case be settled, promising that he would do everything in his power to facilitate a settlement based upon any reasonable offer. In response, Sanders' counsel sent Browns' counsel a letter dated February 5, 1991 offering to settle with Browns for the sum of $70,000. [Ex. 15.] To place that number in context, Browns paid $100,000 for the entire Brown Parcel with a house located on it. [R. 1168-69.] Significantly later, counsel to Sanders and counsel to Browns negotiated a resolution of the case for $7,000. Browns' counsel spent a year going back and forth with Sanders' counsel documenting that agreement. Sanders then reneged on that agreement. [R. 1209.] After Browns briefed, argued, and prevailed upon two successive motions for summary judgment, Sanders offered to settle his remaining trespass claims for between $1,000 and $2,500, but in each case insisted on retaining his right to appeal issues then previously decided (including the issue whether Browns had access to their property over the right-of-way). [R. 1210-12.]

On November 22, 1994, Browns filed and served in this action a notice of their intention to seek an award of attorney's fees under Utah Code Ann. §78-27-56. [R. 643.] On November 22, 1994 -- after the court had entered both summary judgments, but before trial, Browns served and filed an Offer of Judgment offering to allow Sanders to take judgment against them for $750. [R. 640.] Sanders never responded.

This is only one of many (at least four) lawsuits or proceedings that Sanders has filed arising from the property at issue here. [R. 1096-97, 1106-08, 1114.] Sanders even personally signed a federal RICO complaint, which his attorney declined to execute. [R. 1249-50.] The trial court found that Sanders "likes to litigate." [R. 1330.]

Browns' Legal Expenses. Browns incurred in excess of $29,700 in defending against the claims of Sanders in this action, of which $6,750 is attributable to time expended at trial. The court found those charges to be reasonable under all of the circumstances. [R. 14, 1196.]

SUMMARY OF ARGUMENT

Point I. Sanders cannot rescind Mountainwest's sale of the Brown Parcel to Browns because Sanders is not a party to that transaction and Mountainwest is not a party to this case. Sanders' standing for all of his remaining claims requires that he own the Glanville and Panhandle Parcels, which the trial court found he did not own. Sanders does not challenge that finding.

Point II. Sanders' claims against Browns that arise from alleged subdivision violations were properly dismissed for the following five reasons: (1) Sanders' counsel stipulated to the dismissal of his negligence claim. (2) The applicable limitations statute, Utah Code Ann. §10-9-15 (1953), requires that "any person aggrieved" by a board of adjustment decision must file an action challenging the decision within thirty days. Although Sanders participated in the board of adjustment proceeding and although he claims to be a "person aggrieved," he waited almost two years to challenge the variance. During that time span Browns purchased the Brown Parcel, the subdivision of which was validated by the variance Sanders now challenges. Sanders cannot now challenge the variance because his claim is time barred and to hold otherwise would unfairly prejudice Browns. (3) Ellis v.

Hale, 373 P.2d 382 (Utah 1962) squarely holds that no private right of action exists to challenge the sale of an improperly subdivided lot. Ellis governs this case and should not be overruled. Sanders' claim that Utah Code Ann. §10-9-1002 grants him a private right of action is wrong because that statute did not become effective until long after Sanders filed this action. (4) Glanville, who owned the Glanville and Panhandle Parcels at all material times, had no complaint with Browns or anything they did. Sanders does not challenge this finding on appeal. Glanville consented to or acquiesced in Browns' conduct. (5) Browns caused Sanders no injury because their involvement with the property followed all events that arguably damaged Sanders. The subdivision of which Sanders complains was caused by his lender's foreclosure, which resulted from Sanders not making his payments. Sanders' damages, if any, were self-inflicted.

Point III. The Findings of Fact and Conclusions of Law that were finally entered by the trial court followed three rounds of Sanders' objections, court hearings, and revisions that extended over a ten month period. The trial court was actively involved in the formulation of the findings. Sanders ignores those findings and instead relies on bits and pieces of the court's initial bench ruling to conclude that the court's attorney fee award under Utah Code Ann. §78-27-56 was based only on Sanders' trespass claims that were actually tried. The trial court's findings, however, were based on Sanders' conduct in initiating and prosecuting this entire action, and Sanders does not challenge these findings. They independently sustain the court's decision.

Point IV. If an appellant fails to marshal the evidence in support of and in opposition to the court's findings that are challenged, appellate courts refuse to consider the merits of challenges to such findings. Sanders has made no reasonable effort to marshal the evidence in support of the few findings that he challenges.

Point V. The record supports the trial court's legal determination that Sanders' claims were without merit and her factual finding that his claims were pursued in bad faith. As to the "without merit" conclusion, Sanders's claims were contrary to established law, most are ridiculous on their face, one was voluntarily abandoned, and Sanders' and Glanville's own testimony and conduct demonstrate that the claims were meritless. Sanders does not even challenge most of the trial court's findings supporting his bad faith. Those findings are amply supported by Sanders' own testimony and conduct in fraudulently conveying property to his relatives to protect his assets, but continuing to claim ownership for the purpose of suing Browns, in taking positions totally inconsistent with the positions taken by Sanders when he owned the Brown Parcel and otherwise, in making no effort to rectify the subdivision problem that he claimed was his focus, in making palpably false allegations, and in suing Browns to bring "intense pressure" on them to pay Sanders an obviously outrageous sum. By his own admission, Sanders sued Browns for a legally improper purpose.

ARGUMENT

POINT I

SANDERS LACKS STANDING TO ASSERT ANY CLAIM IN THIS ACTION.

Sanders seeks under his Sixth Cause of Action to rescind Browns' purchase of the Brown Parcel from Mountainwest. Obviously, Sanders cannot rescind a transaction to which he was not a party, particularly when the other party to the transaction -- Mountainwest -- is also not a party! If rescission were proper, who is to pay Browns' money back? All of the remaining claims asserted in this action by Sanders against Browns (and, for that matter, against Draper City) require that Sanders own the Glanville Parcel and/or the Panhandle

Parcel. If Sanders owned no interest in those parcels, which adjoin the Brown Parcel, he obviously cannot be injured by any subdivision, use, trespass, or other activity on or related to the Brown Parcel.

The trial court concluded as a matter of fact and law that Glanville was the owner of the Glanville Parcel and the Panhandle Parcel at all material times, that Sanders had no interest in that land, and that, in any event, because Sanders conveyed to Glanville that land to place it beyond the reach of his creditors, he was estopped to assert that he has any ownership in the property. [R. 901, 908.] Sanders challenges none of these findings or conclusions on appeal. Based upon those findings and conclusions, Sanders is a complete stranger to all affected property and this entire controversy. It necessarily follows that Sanders cannot have been damaged by anything Browns did or did not do, and Sanders has no standing to advance any of the claims that he has made.[3]

POINT II

NEITHER SANDERS NOR GLANVILLE CAN MAINTAIN CLAIMS AGAINST BROWNS ARISING FROM VIOLATIONS OF UTAH'S SUBDIVISION LAWS.

The trial court's Summary Judgment dismissing subdivision-related claims can be sustained on the following five independent grounds:

Sanders Stipulated to the Dismissal of Fifth Cause of Action. At the hearing of Browns' first motion for summary judgment, Sanders' then-counsel stipulated to the dismissal

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[3] As to the trespass claims, a plaintiff must show ownership of or the right to exclusive possession of the property in question. E.g., Wood v. Myrup, 681 P.2d 1255 (Utah 1984). Sanders' "private nuisance" claim under Seventh Cause of Action [R. 158-59] is based on Utah Code Ann. §78-38-1, which was recently amended. As to this claim under the version of Utah Code Ann. §78-38-1 that applies to this action, only a person "whose property is injuriously affected . . . may bring an action." As to Sanders' illegal subdivision claims under Utah Code Ann. §10-9-1002, he must show that he is an "owner of real estate within the municipality."

of Fifth Cause of Action of the Amended Complaint [R. 157], which alleged that Browns' negligent purchase of the Brown Parcel from Mountainwest somehow damaged Sanders[4]:

> [Mr. Lee, Brown's Co-Counsel]: Our final argument is that plaintiffs' negligence claim falls for an additional reason, and that is that plaintiffs have not and cannot assert two of the essential elements of negligence under Utah law. They can't establish any duty running to plaintiffs and they can't establish any injury resulting from defendants' conduct.
>
> Mr. Green [Sanders' then-counsel]: We concede the negligence cause of action should be dismissed.
>
> The Court: All right. Thank you, Mr. Green.
>
> Mr. Lee: Thank you.

[R. 961-62.] An attorney's stipulations and agreements are binding on his or her client. State, in the interest of Davis, 28 Utah 2d 428, 503 P.2d 1206 (Utah 1972).

Plaintiffs' Claims are Barred by the Statute of Limitations. Utah Code Ann. §10-9-15 (1953), the statute applicable to Sanders' claims at the time the causes of action arose,[5] provides as follows:

> The city or any person aggrieved by any decision of the board of adjustment may have and maintain a plenary action for relief therefrom in any court of competent jurisdiction; provided, petition for such relief is presented to the court within thirty days after filing of such decision in the office of the board.

Although Sanders participated in and opposed the variance proceeding about which he now complains, he took no judicial action to challenge that variance for about two years -- long after the expiration of the thirty day limitation period.

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[4] Sanders' negligence claim was based in part on his unlawful subdivision theory. It incorporated by reference the subdivision allegations, and specifically mentioned the variance as a basis for this claim. [R. 157.] See also Sanders' Brief at pp. 2-3.

[5] Sanders incorrectly asserts that Utah Code Ann. §§10-9-1001 and 1002 apply here. These statutes were enacted in 1991, whereas the events giving rise to this action occurred in 1988 and Sanders filed his action in April of 1990. Those provisions are, therefore, inapplicable to this appeal.

To avoid this obvious bar to his claim, Sanders advances three arguments. First, he argues that this limitations period does not apply to "claims that Brown continues to occupy his property in violation of existing subdivision laws, even assuming the validity of the 1988 variance." The short answer to that contention is that the 1988 variance validates the compliance of the Brown Parcel with existing subdivision laws. [Ex. 4.] Sanders then argues that "Brown's failure to comply with the variance" is not foreclosed by the statute. [Brief at 21.] However, the court at trial determined that, according to Draper City, the Brown house is presently a valid nonconforming previously existing use and does not violate the variance issued by Draper during 1988. [R. 904, 910.] The Draper City official charged with enforcing the variance so testified at trial. [R. 1216-18; Ex. 9.] Sanders does not appeal from these determinations.

Second, Sanders claims that the thirty day period does not apply to Sanders' claims against the City. Browns here incorporate by reference the portion of the Brief of Draper City that is addressed to this issue.

Finally, Sanders argues that the limitations period does not apply to Sanders' direct claims against Browns because it applies only to claims seeking review of decisions of the Board of Adjustment. The 1988 variance was granted after a hearing attended by Sanders and was not timely challenged by Sanders. Section 10-9-15 requires that Sanders, as "any person aggrieved," initiate a plenary action for relief within thirty days. He did not. If Sanders is a "person aggrieved," he is bound by that limitations period.[6] If he is not a "person aggrieved," then he has no claim for redress based on the variance. Sanders is

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[6] In a closely analogous context involving limitations and land use planning, the Supreme Court held that whether or not one is a party to the challenged land use proceeding, one is a "person aggrieved" if he or she is adversely affected by the challenged decision. Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 392 P.2d 40 (Utah 1964). Sanders' pleadings clearly allege that he was so adversely affected.

therefore precluded from challenging the validity of the variance, and the variance validates Browns' occupation of the Brown Parcel.

This short limitations period serves the vital purpose of assuring "the expeditious and orderly development of a community." Lund v. Cottonwood Meadows Co., 15 Utah 2d 305, 392 P.2d 40, 42 (Utah 1964). It ensures that after the 30 days have expired, the local decision is final and development may proceed without the risk that an action such as this one will undercut the settled expectations of the parties. This case is a fine example of why the limitations period should bar Sanders' claims against Browns. Sanders, by not challenging the variance for two years, failed to exercise diligence in asserting any violation of the subdivision ordinances. During the period of Sanders' delay, Browns innocently purchased the affected property. Allowing Sanders' claims would substantially prejudice the reasonable expectations of Browns.

Plaintiffs Cannot Maintain a Private Action to Challenge the Sale of a Subdivision Lot Under Zoning and Planning Laws. The trial court correctly followed Ellis v. Hale, 373 P.2d 382 (Utah 1962), which holds that there is no private right of action to challenge the sale of a subdivision lot under zoning and planning laws. Sanders first incorrectly argues that Ellis v. Hale is invalidated by Utah Code Ann. §10-9-1002, which does not apply to this case because it became effective after plaintiffs' causes of action accrued and after the filing of this action. See footnote 5 at page 20 above. Ellis v. Hale was decided at a time when the statute applicable to this case, Utah Code Ann. §10-9-30, was in effect. Ellis v. Hale clearly precludes a private action like the one brought here. Ellis v. Hale specifically held that there is no private right of action against a defendant alleged to have sold an unlawfully subdivided lot. Just as plaintiffs argue here, the plaintiff in Ellis argued that the defendants violated the law by selling a lot where the subdivision had

not been properly approved. The court reasoned that the subdivision laws "were not enacted to promote safety, and they do not attempt to lay down rules regulating the conduct of individuals inter se." 373 P.2d at 384. Accordingly, the court held that the sole remedy for a sale of an unlawfully subdivided lot is the imposition of a criminal sanction. The duty to enforce these laws runs "to the Sovereign" and a violation thereof does not give rise to civil liability. Thus, consistent with Ellis, the Draper ordinances provide a criminal sanction that is to be enforced by the Sovereign, and do not create any private right of action.[7] In this case, it is undisputed that the Sovereign has chosen to approve the subdivision challenged by plaintiffs.

Sanders next argues that Ellis v. Hale should be overruled. This Court should not accept that invitation because Sanders never raised this argument below. [R. 276.] This case, like Ellis, is governed by Utah Code Ann. §10-9-30. That statute has now been replaced by Utah Code Ann. §10-9-1002, which does not govern this case. If Ellis is to be revisited, it should be revisited in its application to the statute of current relevance, which cannot be done here. Finally, the Ellis court's logic and analysis were and are sound. The rule urged by Sanders would undermine municipalities' control over land use planning, would allow private parties to initiate litigation whenever they disagree with municipalities' enforcement decisions, and would render Judges ex officio members of planning and zoning boards.

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[7] Draper City ordinances support this conclusion. The Draper ordinances provide that a violation of the land use and development regulations constitutes a "Class 'B' misdemeanor . . . punishable by a fine of not more than $1,000.00, or imprisonment for not more than six (6) months, or by both such fine and imprisonment for each infraction." [Section 9-2-17.] The City has the duty to "commence action or proceedings for the abatement and removal" of land uses violative of development regulations. [Section 9-2-3(b).] The ordinances assign the duty of enforcing such provisions to the "Building Official/Zoning Administrator," and charge that officer with "entering actions in the regulatory board, commissions or courts when necessary. . . ." [Section 9-2-4.] No private right of action is authorized. These ordinances are included as item 5 of the Appendix.

Glanville Did Not Complain of Browns. The trial court found that Glanville, not Sanders, owned the Glanville Parcel and Panhandle Parcel at all material times. [R. 901, 908.] The trial court also found that Glanville had no complaint with Browns or anything they did. [R. 902, 905, 908.] Sanders challenges neither finding on this appeal. It follows that whatever Browns did, Glanville either acquiesced in it, consented to it, and/or waived any claim arising from it. E.g., Zeese v. Estate of Siegel, 534 P.2d 85, 89 (Utah 1975) [acquiescence in conduct precludes claims based upon it]; K&T, Inc. v. Koroulis, 888 P.2d 623 (Utah 1994) [waiver is an intentional relinquishment of a known right]; Scott v. Jordan, 99 N.M. 567, 661 P.2d 59, 63-64 (N.M. App. 1983) [knowledge of facts giving rise to claims and inaction acts as estoppel].

Plaintiffs Have Shown no Injury From Browns' Claimed Violation of Subdivision Ordinances. Here, it must be remembered that Browns purchased the Brown Parcel in 1989 -- long after Sanders' predecessors granted the trust deed to Mountainwest covering the Brown Parcel and the right-of-way in 1980, after Mountainwest secured Draper City's variance validating the separate Brown Parcel in July 1988, and after Mountainwest's foreclosure of its trust deed and purchase of the property at a trustee's sale in September 1988. Browns could not, therefore, have been a cause of any damage to plaintiffs flowing from subdivision issues. Browns' motion for summary judgment seeking to dismiss plaintiffs' unlawful subdivision claims was based on this reason as well. [R. 199-200.] The trial court granted the motion upon the grounds stated in Browns' memorandum. [R. 311.] Plaintiffs, however, did not contest this reason before the trial court [R. 272-77, 298-99] and therefore are precluded from raising this issue on appeal.[8] A corollary of the foregoing is

[8] Sanders' brief does not assail this ground for the trial court's Partial Summary Judgment.

that the rescission claim asserted against Browns in Sixth Cause of Action of the Amended Complaint [R. 158] must fail. The cause of the "subdivision" of the Brown Parcel from the adjacent Glanville and Panhandle Parcels occurred when Nipkos gave Mountainwest its trust deed in 1980. Sanders thereafter bought the Brown Parcel, assumed that trust deed, and defaulted under it. The resulting foreclosure during 1988 severed the Brown Parcel from adjacent land. Browns' purchase from Mountainwest did not cause the subdivision to occur -- Sanders' failure to pay his lender was the cause.

POINT III

PLAINTIFFS HAVE IGNORED GROUNDS FOR THE TRIAL COURT'S RULING UNDER SECTION 78-27-56.

In challenging the trial court's award to Browns of legal fees under Utah Code Ann. §78-27-56, Sanders mischaracterizes the basis for the trial court's decision. Sanders' Brief incorrectly suggests that the trial court's ruling was based only on Sanders' improperly taking his trespass claims to trial. In fact, the trial court found that Sanders initiated and prosecuted all of his unmeritorious claims in bad faith. A little procedural history is necessary here.

In announcing her decision from the bench, the trial court observed that Sanders made no effort to pursue his claimed desire to make his property marketable in five years of litigation; he made no effort to resolve his problems with Stevenses and Browns; he "likes to litigate;" and he made "no effort" to resolve this case. [R. 1329-30.] At the court's direction, Browns' counsel on August 25, 1995 submitted proposed findings and conclusions to counsel for approval or comment. [R. 804-820.] On September 1, 1995, Sanders submitted objections to those findings. [R. 784.] Sanders specifically requested that the court limit its bad faith findings to the trespass claims that were tried and Sanders' refusal to settle. [R. 786 ¶¶4-6; R. 787 ¶¶7-9.] Sanders specifically objected to paragraphs 7-18 of the

findings, which detailed the basis for the court's findings that all of Sanders' claims were unmeritorious and advanced in bad faith. [R. 786 ¶4.] Sanders objected to paragraph 19 of the proposed findings, which stated that "[t]he claims asserted by Sanders in the action have no basis in law or fact." [R. 786 ¶5; R. 815 ¶19.] Instead, Sanders requested that this finding be limited to trespass and Sanders' lack of standing. [R. 786 ¶5.] The court ordered the parties between themselves further to attempt to resolve disputes concerning the findings. [R. 802.]

After counsels' further discussions, revised proposed findings were served on Sanders' counsel on October 20, 1995. [R. 845-61.] Sanders filed revised objections to those findings on October 30, 1995, in which he renewed substantially all of the objections noted above. [R. 820.] Browns filed a response to that objection on November 3, 1995. [R. 832.] A second hearing concerning Sanders' objections occurred on December 6, 1995. [R. 844.] The court made various rulings and ordered Browns' counsel to prepare a second revised set of proposed findings incorporating those rulings. [R. 844.] On December 11, 1995, Browns' counsel submitted those second revised findings to the court and counsel, along with a letter summarizing the court's ruling. [R. 872.] The trial court overruled Sanders' objections to the findings and conclusions that are relevant here, and indeed requested that some findings be amplified. [R. 872-74.] The trial court also requested and received a transcript of her bench ruling. [R. 874.] Sanders filed his third set of objections on December 18, 1995. [R. 875.] Browns filed their third response on December 29, 1995. [R. 881.] On June 28, 1996, the trial court by Minute Entry ruled on all of Sanders' latest objections. [R. 891.] The trial court, for the third time considering Sanders' objections to the findings, overruled with comment all of Sanders' remaining objections. Also on June 28,

1996, the trial court entered the Evidentiary Ruling, Findings of Fact, and Conclusions of Law that are before this Court on appeal. [R. 894.]

The foregoing history is included to dispel any suggestion that the trial court did not really mean to find as it did or that the findings prepared by Browns' counsel did not correctly express the court's ruling.[9]

In contrast, Sanders' brief at pages 23-29 ignores these findings and conclusions as to all claims save the trespass claims that were tried and attacks only the court's ruling that these trespass claims were improperly pursued. Sanders does not challenge the court's other bases for its award of legal fees to Browns -- Sanders' frivolous claims that were resolved through two summary judgment proceedings. The statement of fact section of this brief, along with Points I and II above, demonstrate that these claims were meritless and pursued in bad faith. Because Sanders has not even challenged[10] these independent bases for the court's decision, the trial court's judgment must be affirmed.

POINT IV

PLAINTIFFS HAVE FAILED TO MARSHAL THE EVIDENCE CONCERNING THEIR CHALLENGES TO THE TRIAL COURT'S FACTUAL FINDINGS.

When an appellant assails the sufficiency of evidence supporting the trial court's findings of fact, it has the burden of marshaling all of the evidence in support of the trial court's findings and then demonstrating that the findings are so lacking in support as to be against the clear weight of the evidence. E.g., Alta Industries Ltd. v. Hurst, 846 P.2d 1282,

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[9] Under these circumstances, the court's findings are entitled to substantial deference. Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977); Alta Industries Ltd. v. Hurst, 846 P.2d 1242 (Utah 1993).

[10] In addition to his failure to challenge these grounds, Sanders necessarily also failed to marshal the evidence concerning the court's relevant factual determinations. This is yet another reason why Sanders' appeal from the Section 78-27-56 ruling must be rejected. See Point IV below.

1286-87 (Utah 1993); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989). When an appellant fails to carry its burden of marshaling the evidence, the appellate courts have refused to consider the merits of challenges to findings and have accepted the findings as valid. Id.; Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987).

Here, as will be demonstrated, plaintiffs have made no reasonable effort to marshal the findings of the trial court in support of and in opposition to its findings that all of the claims of Sanders were not brought or asserted in good faith under Utah Code Ann. §78-27-56. Because Sanders has failed in that indisputable obligation, the trial court's findings in this regard must be affirmed. In the point that follows, Browns will demonstrate that the court's findings are abundantly supported by the record in any event.

POINT V

THE COURT'S DETERMINATION THAT SANDERS' CLAIMS WERE WITHOUT MERIT AND WERE NOT BROUGHT OR ASSERTED IN GOOD FAITH ARE SUPPORTED BY THE RECORD.

The Utah Supreme Court has held that, if a court finds both that the action is without merit and was not brought or asserted in good faith, the court has no discretion and must award reasonable attorney's fees to the prevailing party. Watkiss & Campbell v. FOA & Son, 808 P.2d 1061 (Utah 1991). The trial court made each finding requisite to an award of attorney's fees under this section. [R. 905-07, 910.]

Sanders' Claims Were Without Merit. To establish the "without merit" requirement of the statute, the action must have no basis in law or fact. E.g., Cady v. Johnson, 671 P.2d 149 (Utah 1983); Jeschke v. Willis, 811 P.2d 202 (Utah App. 1991). The court concluded that "[t]his action is without merit and was not brought or asserted in good faith

within the meaning of Utah Code Ann. §78-27-56." [R. 910.] That legal conclusion was based upon extensive findings of fact, none of which are specifically challenged by Sanders.

Sanders asserted four claims against Browns. Each was dismissed on the merits either on motion for summary judgment or after trial. The frivolous nature of each will be addressed in turn.

Fourth Cause of Action concerned trespass over the alleged gap between the Brown Parcel and the Right-of-Way Parcel as well as claims that driveways, grass, and horses encroached on Sanders' land. Those claims were first frivolous because Sanders did not own the Glanville and Panhandle Parcels. Contrary to Sanders' claim that Browns "never challenged Sanders' standing to assert the claims until the time of trial" [Brief at 24], that very defense appears in Browns' Answers. [R. 81, 167.] Sanders does not challenge any of the court's findings, which demonstrate that even assuming he had standing, Sanders wholly failed to demonstrate any trespass. [Findings ¶¶9-18; R. 902-05.] Sanders inconsistently complained of Browns' "trespass" behavior, when Sanders himself admitted having acted in just the same manner during his separate ownership of the Brown Parcel. [Findings ¶¶12, 20, 24; R. 903-07.] Sanders alleged that the right-of-way did not furnish access to the Brown Parcel, but admitted that he thought otherwise.

Fifth Cause of Action alleged that Browns' "negligent" purchase of the Brown Parcel from Mountainwest gave him some claim. Sanders' attorney abandoned that claim at the hearing of Browns' motion to dismiss it. This claim was and is frivolous for several obvious reasons: Browns' purchase obviously could not have been a cause in fact of Sanders' injury -- Sanders had already been foreclosed out of his property because he didn't pay his mortgage. Browns obviously owed no duty to Sanders, with whom they had no dealings or contact.

Sixth Cause of Action alleged that Browns' purchase from Mountainwest violated the subdivision laws and should be rescinded. That claim is frivolous because squarely governing law, Ellis v. Hale, 373 P.2d 382 (Utah 1962), bars any such private right of action. It is also frivolous because Sanders obviously has no standing to rescind a transaction to which he is not a party. It is also frivolous because even if rescission were available, Mountainwest was obviously an indispensable but unjoined party. Further, Sanders, who actively opposed the variance validating the subdivision, never timely challenged it. He allowed it to become final and unappealable -- then he ignored it.

Seventh Cause of Action seeks recovery based on "private nuisance" under Utah Code Ann. §78-38-1. It is frivolous because, like Sixth Cause, it ignores the Ellis v. Hale rule and it ignores the validating variance that Sanders actively opposed and then failed timely to appeal. Even if the subdivision were invalid, the version of Section 78-38-1 then in effect defines "nuisance" as "[a]nything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." A violation of subdivision laws is not even arguably within that definition. Finally, Section 78-38-1 only allows those "whose property is injuriously affected" to sue. Sanders did not own any such property.

Sanders attempts to circumvent his lack of ownership (which is only one of the many reasons why his claims are frivolous) through reliance on the Assignment purportedly executed by Margaret Glanville. [Ex. 1.] First, that document was determined to be inadmissible, and Sanders does not challenge that ruling. Sanders does not logically explain how this Court can consider that document, which Sanders now concedes is inadmissible. Second, any claim that the Assignment should have been admissible is also frivolous for the ten reasons set forth in the trial court's Evidentiary Ruling. [R. 895-97.] Third, the

Assignment could only have transferred Glanville's claims, and Glanville testified that he had no complaint with Browns.

Sanders' Claims Were Not Asserted in Good Faith. "[A] lack of good faith turns on subjective intent." Chipman v. Miller, 312 Utah. Adv. Rptr. 37, 39 (Utah Ct. App. 1997). The absence of good faith can be demonstrated by a showing that plaintiff intended to hinder, delay, or take advantage of another. Cady v. Johnson, 671 P.2d 149 (Utah 1983). "A finding of bad faith is a question of fact and is reviewed by this court under the 'clearly erroneous' standard." Jeschke v. Willis, 811 P.2d 202, 204 (Utah Ct. App. 1991).

The trial court in paragraphs 19 through 25 of its Findings of Fact [R. 905-07] detailed the facts showing that Sanders acted in bad faith. Sanders' Brief does not even mention, much less marshal the evidence as to, those findings. Sanders must show that "the evidence, viewed in a light most favorable to the trial court, is legally insufficient to support the contested finding." Utah Dept. of Soc. Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991). This he cannot do.

After conveying away the Glanville Parcel and the Panhandle Parcel to place them beyond the reach of his creditors, Sanders nevertheless took the position that he continued to own those parcels for the purpose of harassing Browns with this lawsuit. Sanders' concurrent positions that his creditors could not reach these assets, but Sanders could continue to claim ownership to sue Browns, is itself an act of bad faith.

The court found that Sanders' claims in this action were "completely inconsistent with and contradictory to his own statements and actions during his ownership of the Brown Parcel." [R. 905.] Sanders admits that he occupied and used the Brown Parcel (before he acquired the Glanville Parcel and the Panhandle Parcel) exactly as the Browns did. In this

action, he asserts that the Browns, by acting as he did, acted improperly and actionably. Sanders admits that at the time he acquired the Brown Parcel with its appurtenant right-of-way, he understood and believed that the right-of-way was adjacent to the Brown Parcel. However, after the Browns bought the same property, Sanders sued them claiming that the right-of-way was not adjacent to the Brown Parcel. During his independent ownership of the Brown Parcel, Sanders used his driveway, parked cars, contoured landscape, and otherwise acted with respect to the Brown Parcel just as the Browns did. However, after Sanders was foreclosed out, he sued the Browns claiming that their acting as he had acted constituted a violation of his rights. Sanders admitted that none of the Browns' activities in any way interfered with Sanders' use of his property. With respect to the horse trespass issue, Sanders gave Newman permission to run horses on the Glanville Parcel. Indeed, Sanders desired that horses run there to keep the foliage eaten down. Nevertheless, after Mountainwest foreclosed Sanders out, with no prior communication, he had his attorney demand that Browns remove their horses from Newman's pen, which Browns did within one to two days after the request. Nevertheless, shortly thereafter Sanders sued Browns for this claimed trespass. During Sanders' deposition, Browns' counsel asked Sanders to come up with a fair rental for the Browns' horses' occupation, promising that Browns would pay that fair rent to Sanders. In the two and one-half years that followed prior to trial, Sanders never advised Browns of a fair rental amount as he promised he would.

The point of the foregoing is that, from a factual standpoint, Sanders in this action took positions that are irreconcilably inconsistent with the positions that he took when he owned the Brown Parcel. Sanders' legal positions were also inconsistent. He asserted that the Brown Parcel (which he, himself, owned and occupied separately) violated zoning ordinances that should be enforced against the Browns. He asserted that the right-of-way

that he used to access the Brown Parcel during his separate ownership of it was located in such a way as not to furnish access for the Browns. He asserted that Browns' purchase of the property from Mountainwest, Sanders' foreclosing lender, violated his rights. He asserted that Mountainwest's sale of the property to Browns (a transaction to which he was not a party) was illegal and should be rescinded. He asserted that the Browns' very occupation of the same property that he, himself, had previously occupied separately constituted a "private nuisance."

Sanders admits that Browns had nothing to do with the subdivision problem that preoccupies him and that he never met or communicated with them before suing them. They appeared on the scene only after the subdivision occurred, after the variance validating it was allowed, after Sanders had been foreclosed out of the Brown Parcel, and indeed after Sanders had conveyed his contiguous property to his relatives. Sanders even admitted that he had not been wronged by the Browns. Sanders testified that his purpose in litigating was to rectify his subdivision problem and make his property saleable as a legal lot, but Sanders made absolutely no effort to accomplish those goals. Instead, Sanders sued Browns for money and even sought punitive damages based upon the patently false claim that Browns' acts were intentional and malicious.

The trial court found that Sanders filed and prosecuted this action to hinder, bother, harass and take advantage of Browns and to coerce them into paying Sanders large amounts of money in settlement. That finding is supported by an examination of Sanders' claims themselves as well as Sanders' own trial and deposition testimony that he filed suit to bring "intense pressure" to bear on Browns to pay settlement money. [R. 1127-28, 1431.] Consistently, Sanders' wild settlement demand was for $70,000 -- 70% of what Browns paid for their house and property. Later on in the case, Sanders agreed to a settlement with

Browns for $7,000, but after a year of Browns' attempting to document the settlement transaction, Sanders reneged. Even though Browns moved their lawn, moved their horses and offered to pay Sanders fair rent for any claimed trespass, Sanders would have none of it. He barreled ahead with his litigation. Sanders forced Browns to litigate for seven years and to spend tens of thousands in defense costs concerning claims that were economically minuscule (even assuming they were meritorious and accepting Sanders' own version of their value). Sanders would never agree to settle the case with Browns without preserving his right to appeal the frivolous claim that Browns lacked access to their property, which had already been decided on motion against Sanders. Sanders used this litigation as a club with which he attempted to bludgeon Browns into paying large amounts for baseless claims. Sanders admits to having filed as many as four lawsuits involving this same property -- including a federal RICO action that Sanders signed himself because his attorney declined.

As the trial court observed, "Mr. Sanders is someone who likes to litigate." [R. 1330.] Here he filed baseless claims and stubbornly pursued them in bad faith, thereby hurting some nice people who did nothing wrong. Browns' legal expenses now approach half of the purchase price of Browns' house. Section 78-27-56 is aimed at precisely the kind of abuse that Sanders has perpetrated here.

CONCLUSION

The trial court found, as a matter of fact, that Sanders owned no interest in any of the real property that is the subject of this action. That factual determination has not been challenged by Sanders in this appeal. Sanders' lack of any ownership in any relevant property is fatal to each and every claim that he asserts against Browns.

The district court's first summary judgment against Sanders, which dismissed Sanders' claims of illegality, private nuisance, and negligence, was correct and can be

sustained on these grounds: (i) Sanders stipulated to dismiss his negligence claim; (ii) the limitations period expired for any challenge to the variance validating the subdivision; (iii) even if Sanders owned adjacent property, private parties have no standing to enforce Draper's planning and zoning ordinances; (iv) Glanville, the owner of the adjacent property, had no complaint with Browns' conduct; and (v) Sanders showed no injury from Browns' alleged subdivision problem.

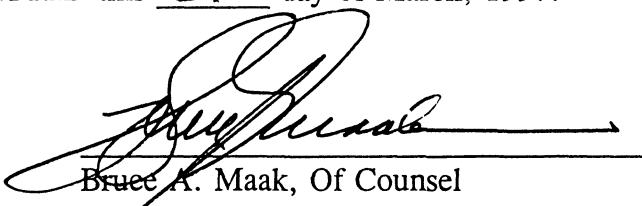
This is a clear case for application of Utah Code Ann. §78-27-56. Sanders does not even challenge most of the trial court's findings; as to those that he does challenge, he ignores his duty to marshal the evidence. A mountain of evidence establishes Sanders' bad faith. Sanders' initiation and stubborn pursuit of his frivolous claims have been characterized by evident bad faith and have subjected innocent people to a legal expense that itself is punitive and disproportionate to the character of the dispute.

The trial court's Final Judgment dismissing with prejudice all of plaintiffs' claims against Browns should be affirmed, Browns should be awarded their costs on appeal, and, pursuant to paragraph 16 of the trial court's Conclusions of Law [R. 910], this Court should remand this case for a determination of the amount of additional attorney's fees incurred on appeal to be awarded to Browns.

ADDENDUM

There is no Addendum to this brief because no Addendum is necessary and Browns rely upon the Addendum of plaintiffs/appellants.

RESPECTFULLY SUBMITTED this 31 day of March, 1997.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Brief of Appellees Brown was served this 31 day of March, 1997 by delivering on said date two (2) true and correct copies thereof to each of the following:

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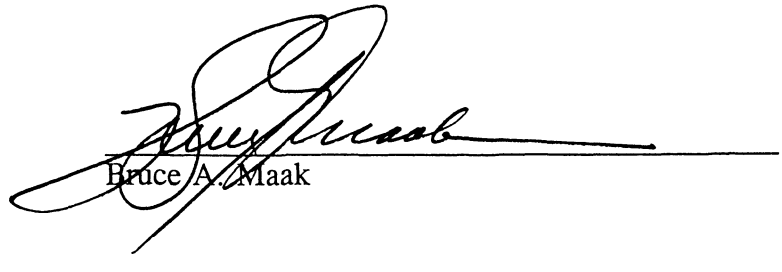

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